

The Honorable Richard A. Jones
United States District Court Judge
Calendar Date: June 29, 2012

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

PORTFOLIO INVESTMENTS,
LLC, a Washington limited liability
corporation; STEVEN J. NIKOLITCH,
both individually and on behalf of the
community property marital estate of
STEVEN J. NIKOLITCH; MARCIA
A. NIKOLITCH, both individually and
on behalf of the community marital
property estate of STEVEN J.
NIKOLITCH and MARCIA A.
NIKOLITCH; STEVEN J.
NIKOLITCH, managing member,
PORTFOLIO INVESTMENTS, LLC,
a Washington limited liability
corporation,

Plaintiffs,

vs.

FIRST SAVINGS BANK
NORTHWEST, a Washington State
chartered bank; EXECUTIVE
HOUSE, INC., a Washington
corporation; JOHN P. MILLS, both
individually and on behalf of the
community property marital estate;
DAVID KROEGER; JEFF PRESTON;
VICTOR KARPIAK; FIRST
FINANCIAL NORTHWEST, INC., a

Civil No. 2:12-cv-00104-RAJ

*MOTION TO DISMISS RICO
COMPLAINT PURSUANT TO FRCP
12(b)(6) WITH PREJUDICE and 28
USC Sect.1367(c) AS TO STATE LAW
CLAIMS WITHOUT PREJUDICE*

Brought by Defendants Tax Attorneys,
Inc., Susan Chang, John E. Cicero II and
Melanie R. Cicero

ORAL ARGUMENT REQUESTED

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Washington corporation; FIRST
FINANCIAL DIVERSIFIED
CORPORATION, a Washington
corporation; TAX ATTORNEYS,
INC., a Washington corporation;
SUSAN CHANG; JOHN E. CICERO,
II. And JANE DOE CICERO, both
individually and on behalf of their
community property marital estate;
METROPOLITAN REALTY
GROUP, a Washington corporation;
and JUSTIN CICERO and JANE
DOE CICERO both individually and
on behalf of their community property
marital estate,

Defendants.

COME NOW Defendants Tax Attorneys, Inc., Susan Chang, John E. Cicero II
and Melanie R. Cicero, hereinafter “the Moving Party Defendants or Defendants”, by
and through their undersigned attorney and present the following:

I. RELIEF REQUESTED. The Defendants request that the
Court dismiss with Prejudice the Federal RICO claims of Plaintiffs against the
Defendants upon which the Plaintiffs allege this Court has subject matter jurisdiction
pursuant to FRCP 12(b)(6) for the failure to state a claim upon which relief may be
granted and to thereafter dismiss the state law claims without prejudice pursuant to 28
USC Sect. 1367(c). Proposed Order attached as Exhibit A

**II. SUMMARY STATEMENT OF FACTS PLAINTIFFS ALLEGE AS
THE ACTS OR OMISSIONS THAT COMPRISE PREDICATE ACTS UNDER
RICO.**

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1 Defendants letter to Plaintiff Nikolich dated January 28, 2010 offering
2 assistance (Par. 59); Phone call by Plaintiff Nikolich to Defendant Chang in which
3 assistance was offered (Par. 60); Initial meeting on March 31, 2010 with Defendants in
4 which assistance was offered, methodologies explained in generalities (exclusive
5 system, inside confidential information, no cost to Plaintiff and promises of
6 compensation by referrals) but rejected by Plaintiff Nikolich (Par. 61-63); Failure by
7 Defendant Chang to explain how attorneys intended to operate to assist Plaintiff (Par.
8 64A); Defendant Chang pressured Plaintiff to file a Chapter 11 in Bankruptcy to stay
9 foreclosure actions scheduled for May 7, 2010 (Par. 68); On May 4, 2010 demanded
10 that Plaintiff list properties with Metropolitan Realty group, Inc. for short sale efforts
11 (Par.70); Failure to follow through with calls to Bank as requested (Par.73-74);
12 Defendants alleged to have had Bank letter head list of clients in trouble (Par76);
13 Refused to disclose how list of banking clientele was obtained and Plaintiff protested
14 (Par. 76A); Defendants unresponsive to questions regarding efforts to negotiate with
15 Bank (Par. 78); Failure to perform as promised (Par. 79-80); Defendant Chang engaged
16 in “backpedalling” when questioned as to why Justin Cicero did not appear at meeting
17 (Par.81); Disclosure that Justin Cicero and Metropolitan Realty Group, Inc. were
18 clients of Tax Attorneys, Inc and a conflict of interest explained the non appearance
19 (Par 81B); Failure to disclose Justin Cicero not an attorney (Par. 82); Plaintiff alleges a
20 pre-existing relationship by Defendants with inside person at Bank (Par. 83); Alleged
21 inside informant with Defendant Bank and other unnamed banks as the unique system
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1 in the letter of January 28, 2010 as supported by representation that Bank would pay
 2 Plaintiff's attorneys fees (Par. 84); and Failure to produce files after law firm
 3 terminated by Plaintiff (Par 87).

4 **III. LEGAL STANDARDS APPLICABLE TO THE MOTION.**

5 To sustain a RICO action, a Plaintiff must allege with particularity: (1)that the
 6 Defendant (2) through the commission of two or more acts of racketeering (3)
 7 constituting a pattern (4) of racketeering activity (5) directly or indirectly participates in
 8 (6) an enterprise (7) the activities of which affect interstate commerce. *Hecht v.*
 9 *Commerce Clearing House, Inc.*, 897 F. 2d 21, 23 (2d Cir. 1990) citing *Sedima,*
 10 *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 87 L.ED 2d 346, 105 S. Ct. 3275 (1985).
 11 When deciding a Motion to Dismiss under FRCP 12(b)(6) the Court may look only at
 12 facts alleged in the complaint and its attachments. The Court must accept as true all
 13 well pleaded allegations and view them in the light most favorable to Plaintiff. A FRCP
 14 12(b)(6) Motion will be granted only when it is certain that no relief can be granted
 15 under any set of facts that can be proven by Plaintiff. *Ransom v. Marrazzo*, 848 F. 2d
 16 398, 401 (3d. Cir. 1988). Under 28 U.S.C. Section 1767(a) the District Court has
 17 supplemental jurisdiction over related state law claims but a Court may decline to
 18 exercise supplemental jurisdiction if among other reasons Section 1767(c)(3) the
 19 District Court has dismissed all claims over which it has original jurisdiction. *SEI*
 20 *Hawaiian Cogenerators, Inc. et al v. ABB Hawaiian Co Generators, et al*, 1995 U.S.
 21 Dist. LEXIS 22581 (appeal subsequently dismissed by agreement), citing *Executive*
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1 *Software North America, Inc. v. United States District Court*, 24 F.3d 1545 (9th Cir.
 2 1994), overruled on other grounds *California Department of Water Resources v.*
 3 *Powerex Corp.*, 533 F. 3d 1087 (9th Cir. 2008).

4 IV. ARGUMENTS IN SUPPORT OF THE MOTION.

5 A. Mere conclusionary allegations that the alleged acts or 6 omissions by Defendants constituted Predicate Acts for a RICO violation will not 7 support a cause of action.

8 Plaintiffs merely allege in Section VII of the Complaint (page 78-81) that the
 9 “above activities” (the facts alleged in 76 pages of factual allegations) against all
 10 Defendants were racketeering activity as defined in 18 USC Sect. 1961(1) and then
 11 listed four pages of statutes and repeats the same vague and conclusionary allegations in
 12 their First Claim for Relief as “Predicate Offenses” without in either section of the
 13 Complaint specifying which act or omission by which Defendant constituted any of the
 14 specified crimes (covering 93 paragraphs and 78 pages of the pleading). The Plaintiff
 15 merely incorporates all the facts by reference and asks each Defendant and this Court to
 16 conclude how they match which crime listed in four pages of statutes which fails to
 17 comply with the notice pleading requirement under FRCP 8(a)(2) and entitles
 18 Defendants to have the Complaint dismissed. *Russell v. Ray v. Nicholas A. Karris*, 780
 19 F2d 636, 645 (7th Cir. 1985). The Court in *Kristoff Gintowt v. TL Ventures*, 226 F.
 20 Supp. 2d 672 (E. D. Pa. 2002) similarly dismissed a complaint under Rule 12(b)(6) and
 21 allowed amendment when 37 pages of factual allegations defectively failed to identify
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1 how each Defendant violated mail and wire fraud using only general conclusionary
 2 allegations as the Plaintiffs did in the present case.

3 **B. The Plaintiffs cannot prove a case of mail fraud, the only**
 4 **possible act Defendants are alleged to have committed that fit any of the criminal**
 5 **statutes violated identified under 18 U.S.C. Sect. 1961(1)**

6 The only possible criminal act under Section 1961(1) the Defendants could have
 7 committed based on the facts alleged was a violation of 18 U.S.C. Section 1341 mail
 8 fraud which is listed as a criminal act under 18 U.S.C. Section 1961(1). Defendants are
 9 alleged to have sent a letter on January 28, 2010 to Plaintiff Nikolich but only one letter
 10 is alleged to have been mailed (Par. 58). This lack of a second letter eliminates any
 11 chance Plaintiff could even re-plead by amendment that a pattern of racketeering
 12 occurred. *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940
 13 F.2d 397, 405 (9th Cir. 1990). In addition there was no allegation by Plaintiffs that any
 14 or which of the statements in the letter were false, also a requirement for alleging a
 15 predicate act. *First Global Communications, Inc. v. Jackson Bond*, 2006 U.S. Dist.
 16 LEXIS 5919 (W.D. Wash. 2006); *Richard G. Saine v. National Health Insurance*
 17 *Company* 582 F. Supp. 1299, 1303 (D. Col. 1984); *Crawford & Sons, Ltd, et al v.*
 18 *Rochelle Besser, et al*, 216 F.R.D. 228, 234 (E.D. NY 2003). Nor did it allege the
 19 scienter requirement that the Defendants knew it was false. *C.M. Flowers v. Continental*
 20 *grain Company, et al*, 775 F. 2d 1051 (8th Cir. 1985) Even if the allegations constituted
 21 a scheme to defraud which is not specifically pleaded to meet FRCP 9(b) requirements,
 22 the complaint only identifies a single transaction between Plaintiff Nikolich and

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Defendants and does not satisfy the RICO requirement of a pattern of racketeering activity. See holdings in *Durning v. Citibank International, et al*, 990 F. 2d 1133 (9th Cir. 1993); *Secon Service System, Inc. v. St Joseph Bank and Trust Company, et al*, 855 F2d 406, 420 (7th Cir. 1988); and *International Data Bank Ltd. V. Eugene Zepkin, et al*, 812 F2d 149 (4th Cir. 1987). As to the other factual allegations and causes of action based thereon, none such as Cause of Action Number 1 on Page 88 specify which crimes listed in 18 U.S.C. Sect. 1961(1) and do not advise Defendants sufficiently on which crimes they are alleged to have committed. *Russell v. Ray v. Nicholas A. Karris*, 780 F2d 636, 645 (7th Cir. 1985). .

C. The failure to allege predicate acts on which a pattern of racketeering can be established is fatal to a RICO Complaint for conspiracy, aiding and abetting, money laundering, respondeat superior, and dissolution of a RICO enterprise.

Plaintiffs causes of action numbers 6 and 7, are based on an alleged conspiracy and no predicate acts are sufficiently alleged under CR 8(a)(2) as being independently wrongful under 18 U.S.C. Section 1961(1), so the Defendants can't be held to have conspired to do a non racketeering act and the causes of actions based on RICO must be dismissed. *Beck v. Prupis*, 529 U.S. 494, 500, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000). Similarly no one can be held for aiding and abetting as an actionable offense under RICO as alleged in Plaintiffs' Causes of Actions numbers 2 (Page 102) and 5 (Page 109) since there is no RICO cause of action for a private aiding and abetting. *Pennsylvania Association of Edward Heirs v. David Paul Rightenour, et al*, 235 F.3d 839, 843 (3d Cir. 2000). Plaintiffs conclude in their complaint without any factual

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1 allegation to support it that Defendants received a monetary benefit (Par. 112) when
 2 there are no allegations in the 67 pages of factual allegations that this ever occurred.
 3 The conclusionary money laundering allegation which requires under 18 U.S.C. Sect.
 4 1957(a) that the defendant received over \$10,000 from a specified unlawful activity is
 5 unsupported by the factual allegations that Defendants received any monetary benefit
 6 from the transaction and therefore cannot stand. Even though this Circuit has held that
 7 mail fraud as defined in 18 U.S.C. Section 1341 is a specified unlawful activity within
 8 the meaning of the money laundering statute (18 U.S.C. Section 1956(c)(7)(A) (*United*
 9 *States v. Taylor*, 984 F.2d 298(9th Cir. 1993), absent the receipt of a monetary benefit
 10 that claim cannot stand. Cf *United States v. Hare*, 49 F.3d 447, 452 (8th Cir. 1995).
 11 Plaintiffs' Cause of Action No. 3 (Page 107) against Defendant Tax Attorneys, Inc. only
 12 for respondeat superior liability is unfounded and should be dismissed because
 13 Plaintiffs have not alleged that the defendant received any benefit from the RICO
 14 unspecified racketeering acts and none of which existed. *Quick v. Peoples Bank of*
 15 *Cullman County, et al*, 993 F.2d 793, 797 (11th Cir. 1993). Plaintiffs' 23rd and 24th
 16 Causes of Action (identical as to Defendant Tax Attorneys, Inc.) to dissolve the
 17 enterprise cannot be proven since no racketeering acts have been alleged. *Beck v.*
 18 *Prupis*, 529 U.S. 494, 500, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000). Plaintiffs Cause
 19 of Action No. 50 (Page 369) is defective and must be dismissed because it has stated no
 20 facts on which it bases their pure speculation (informed and believed basis unsupported
 21 by any facts) that defendants' own or control other entities. *Bell Atlantic Corp. v.*

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1 *Twombly*, 550 US 544, 555, 127 S. Ct.1955, 166 L. Ed. 2d 929 (2007). Mere
 2 conclusionary allegations are insufficient to sustain a complaint for a RICO action.
 3 *Winters v. Jordan*, 2010 U.S. Dist. LEXIS 74065; *Eisenberger v. Spectex Industries,*
 4 *Inc., et al*, 644 F. Supp. 48,51 (E.D. NY 1986).

5 **D. Plaintiffs amalgamation of claims under Causes of Action 20**
 6 **through 22 are defective because they are not predicate acts under 18 U.S.C.**
 7 **Section 1961(1)**

8 As to Plaintiffs' Cause of Action No. 20 (Page 177) ,21 (Page 183) and 22 (Page
 9 189) it is alleged that the failure to disclose even when questioned by Defendants' as to
 10 their "unique skills", a supposed conflict of interest, failure to perform requested
 11 actions, filing a Chapter 11 on the eve of a foreclosure, the existence of a "pre-existing
 12 relationship" with someone at the Bank (details not specified because apparently not
 13 known) and somehow these allegations and the "aforementioned racketeering
 14 activities" were fraudulent (Par. 242). First of all, the failure to perform future promises
 15 (example: Plaintiffs' allegation in Paragraph 235) is not fraud. An absolute guarantee
 16 that the Bank would pay legal fees (Par. 249) although a stretch in logic based on the
 17 facts alleged in the complaint, itself a mere conclusionary allegation, is only a failure,
 18 even if true, to perform a future promise and not a RICO predicate act. *Seattle Pacific*
 19 *Industries, Inc. v. Melmarc Products, inc.*, 2007 U.S. Dist. LEXIS 7547 (W.D. Wash.
 20 2007). Additionally, a Plaintiff must plead fraud with particularity under FRCP 9(b)
 21 stating what representations were false if these facts are to be argued as being
 22 fraudulent. *Seattle Pacific Industries, Inc. v. Melmarc Products, Inc* , *Supra*; *Semegen*

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1 v. *Weidner, et al*, 78 F.2d 727, 731 (9th Cir. 1985); *Richard G. Saine v. National Health*
 2 *Insurance Company* 582 F. Supp 1299, 1303 (D. Col. 1984). However common law
 3 fraud is not a predicate act under RICO. As to the alleged conflict of interest by the
 4 law firm (Par. 236) which Plaintiffs allege was not disclosed, there is no conflict
 5 because those Defendants' interest which are not directly adverse to the moving
 6 Defendants pursuant to the Washington Bar Association's Rule of Professional
 7 Conduct 1.7(a)(1), and is a matter for the Disciplinary Office of the WSBA in any event
 8 and not an enumerated criminal act under RICO. Filing an emergency Petition in
 9 Chapter 11 the day before a scheduled foreclosure sale of Plaintiffs' properties is hardly
 10 an action to injure the Plaintiffs by any standard applying even common sense, since
 11 there was no injury from a racketeering act and the action helped the Plaintiffs to
 12 prevent the loss of their properties. *Bache Halsey Stuart Shields Incorporated v. Tracy*
 13 *Collins Bank & Trust Company*, 558 F. Supp. 1042 (D. Utah 1983) Plaintiffs merely
 14 speculate and fail to allege how this "scheme" fits under any category of the listed
 15 RICO crimes and was designed to injure. It runs up against the further difficulty that an
 16 allegation of scienter even if the alleged conduct was a sufficient scheme to constitute a
 17 basis for mail fraud but is irrelevant due on the facts pleaded in this Complaint that
 18 there was no more than one mailing, cannot be sustained as a RICO predicate act by
 19 merely conclusionary and unsupported allegations sufficient for a strong inference that
 20 the Defendants had the specific intent to commit fraud as a predicate act. *Anderson v.*
 21 *Smithfield Foods, Inc.*, 209 F. Supp. 2d 1270, 1275 (M.D. Fla. 2002). Although wire
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1 fraud is alleged by conclusion only in Cause of Action Number 1 with no specific facts
 2 asserted as the basis for wire fraud, no allegations that telephone calls to carry out the
 3 “scheme” were made in interstate commerce and intrastate calls are not violations of
 4 the wire fraud statute 18 U.S.C. Sect. 1343. *Metro Furniture Rental, Inc. v. Alessi, et*
 5 *al*, 770 F. Supp. 198, 201 (S.D. NY 1991). If the Court is concerned with Plaintiffs’
 6 allegations in Paragraph 62 that “kickbacks” or compensation from commissions
 7 earned on referrals of real estate transactions that were proposed was wrongful,
 8 although that characterization is exaggerated, sharing commissions between real estate
 9 brokers (Nikolich and Justin Cicero are both brokers) is not only a common occurrence
 10 in the state of Washington but permitted by law. See R.C.W. 18.86.080(1).

11 **E. Causes of action against other Defendants are not affected by**
 12 **this Motion**

13 Defendants do not challenge Causes of Action 3, 8-19, 25-40, 43, 44, 51, 52 and
 14 57 because the Moving Defendants are not named in those claims. Similarly the
 15 allegations in Causes of Action No’s 53, 54, 55 and 56 are stayed by prior filings in
 16 Bankruptcy in the Western District of Washington by those Defendants so are not
 17 addressed in the Motion.

18 **F. The State law causes of action should be dismissed without**
 19 **prejudice.**

20 This Court should dismiss the RICO causes of actions for the reasons stated in
 21 this Motion because there have been no predicate acts alleged and an amendment will
 22 not help for an additional letter as a predicate act for a pattern of racketeering activity
 23 does not exist and cannot be created by such an amendment. Without the original

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jurisdiction that a RICO claim allows, as stated in 28 U.S.C. Section 1767(c), the remaining state law claims should be dismissed without prejudice. *SEI Hawaiian Cogenerators, Inc. et al v. ABB Hawaiian Co Generators, et al*, 1995 U.S. Dist. LEXIS 22581 (appeal subsequently dismissed by agreement), citing *Executive Software North America, Inc. v. United States District Court*, 24 F3d 1545 (9th Cir. 1994), overruled on other grounds *California Department of Water Resources v. Powerex Corp.*, 533 F3d 1087 (9th Cir. 2008).

V. CONCLUSION

Since no predicate acts under RICO have been or could be alleged, the RICO Causes of Action against the Moving Parties herein, Numbers 1, 2, 4-7, 20-24 and 50 should be dismissed with prejudice. The remainder (Numbers 41, 42, 45-49) being State law claims should be dismissed without prejudice. In addition, this long repetitive complaint comprising 57 Causes of Action and 429 pages violates FRCP 8(a)(1) and (2) and on that ground alone could be dismissed. *Bettye Hartz et al v. Albert Brooks Friedman, et al*, 919 F.2d 469, 471 (7th Cir. 1990).

Respectfully submitted this 11th day of June, 2012.

JOHN E. WOODBERY, P.S.

s/ John E. Woodbery

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the above captioned court the date noted below.

June 11th, 2012

s/ John E. Woodbery

John E. Woodbery, WSBA# 8209

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